

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JACOB ALLEN YDROGO,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DAVID TALLMAN,

Respondent-Appellant.

UNPUBLISHED

January 25, 2007

No. 270568

Tuscola Circuit Court

Family Division

LC No. 99-007287-NA

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(g) and (h). For the reasons set forth in this opinion we affirm the decision of the trial court.

Respondent's parental rights were terminated at the initial disposition. The trial court relied primarily on the fact that he was incarcerated with an uncertain release date. The two issues on appeal are whether the trial court erred in failing to make a separate finding of jurisdiction before finding that the statutory grounds for termination were met; and whether MCL 712A.19b(h) applies to incarcerated respondents to the exclusion of subsection (g), and if they are not exclusive, whether both subsections were established by clear and convincing evidence.

The child who is the subject of this proceeding, Jacob Ydrogo, was born January 6, 2003, while respondent was incarcerated. His half-siblings were in foster care, Jacob joined them. The trial court assumed jurisdiction over him on April 15, 2003 pursuant to Lisa Ydrogo's plea. No allegations were made in the petition regarding respondent, but the trial court considered him Jacob's putative father and provided respondent with notice of the proceedings. Jacob remained a temporary court ward for one year, until he was reunited with Lisa Ydrogo in early 2004. His temporary wardship, along with that of some of his half-siblings, was terminated in an order dated April 20, 2004. Five months after reunification, on September 30, 2004, petitioner filed a new petition alleging Lisa Ydrogo's substance abuse and neglect and abuse of her children, and

respondent's incarceration. The petition requested only termination of Lisa Ydrogo's parental rights.

On the day scheduled for the adjudication trial, Lisa Ydrogo, who was also incarcerated at that time, voluntarily released her parental rights to Jacob and two other children. The trial court acknowledged that there was not yet a request for termination of respondent's parental rights, but that petitioner intended to file a supplemental petition forthwith.

On December 12, 2005, petitioner filed an Amended Petition for Jurisdiction and Termination of Parental Rights, seeking jurisdiction over Jacob under MCL 712A.2(b)(1) and (2), and termination of respondent's parental rights under MCL 712A.19b(3)(a)(ii), (g), and (h). The petition to terminate respondent's parental rights was filed pursuant to MCL 712A.19b(3)(g)(h) which states as follows:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following: (a) The child has been deserted under any of the following circumstances: (ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

The trial on the December 12, 2005 petition was held on April 25, 2006. Caseworker Leroy Hayward testified regarding the services recommended to respondent in a treatment plan, respondent's inability to comply due to incarceration, and the fact that respondent had never seen Jacob but had mailed him only two cards and some letters. Respondent's parole officer testified regarding respondent's various convictions. The parole officer did not know when respondent would be released, how much time respondent would be required to serve for the extortion parole violation, or the maximum length of respondent's sentence. Respondent testified, and documents in the lower court record affirmed, that he had attempted to obtain parenting classes in prison, but that they were not available for his security level. His next parole hearing was scheduled for February 2007, and he stated that he was doing everything possible to obtain parole. His plan following release was to reside with his parents until he could afford housing, and to obtain employment. In response to questioning by the trial court, respondent acknowledged that he did not have stable, full-time employment or stable housing during the 18 months he was free in society from March 2001 to September 2002.

Following testimony, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(g) and (h), finding that respondent's sentence was such that he could be incarcerated for two additional years, and that respondent's history of unemployment and

unstable housing indicated that, even if he were released from prison in fewer than two years, he would be unable to provide Jacob with proper care or adequate parenting within a reasonable time. The trial court stated that it relied in part upon subsection (h) in this case, knowing that respondent would appeal its decision, so that trial courts across the state could receive guidance from this Court regarding the standard of proof required for a finding that an incarcerated parent would be imprisoned in excess of two years, given the fact that in many terminations sought under subsection (h) there is no firm release date. Defendant then appealed, asserting that the trial court lacked jurisdiction over the minor child.

This Court has explained that when the trial court obtains jurisdiction over children on the basis of one parent's plea of admission to allegations that the children suffered abuse or neglect, MCL 712A.2(b) the court rules and due process permit a court to enter dispositional orders affecting the other parent, despite that the other parent has failed to appear in the proceedings. MCR 5.973(A); *In re CR*, 250 Mich App 185, 202-203, 205; 646 NW2d 506 (2002). This Court cautioned only that, according to MCR 5.974(E)(1) the petitioner must introduce legally admissible evidence in order to terminate the parental rights of the parent who was not subject to an adjudication. *In re CR*, *supra* at 205-206.

This Court has held that the subject matter of a child protective proceeding is the child. *In re Gillespie*, 197 Mich App 440, 442; 496 NW2d 309 (1992). Two proceedings were conducted with regard to Jacob. The first commenced shortly after his birth, and the trial court assumed jurisdiction over him pursuant to his mother's plea. It terminated jurisdiction one year later when the agency reunited Jacob with his mother. The second proceeding commenced five months later, during which Jacob's mother voluntarily released her parental rights. Despite respondent's contention that there was no request to terminate respondent's parental rights until petitioner filed an Amended Petition for Jurisdiction and Termination of Parental Rights, respondent was allowed to introduce evidence and answer the charges of neglect that had been filed against him.

Respondent also argues that the legislature intended subsection 19b(3)(h) to apply to incarcerated respondents to the exclusion of subsection 19b(3)(g) because it is more specific in allowing a two-year window of time for respondent to provide a proper home, instead of the more general "reasonable time" contained in subsection 19b(3)(g). Subsection 19b(3)(g) is more general than many of its companion subsections, particularly because it applies regardless of intent, but reliance on a more specific subsection to terminate parental rights does not exclude reliance on subsection 19b(3)(g). Desertion for more than 91 days, abandonment, physical or sexual abuse, torture, failure to support or visit a child under a guardianship for more than two years, and elements of various other subsections all constitute a failure to provide proper care or custody as found in subsection (g), and through its numerous decisions this Court has clearly indicated that the existence of, or reliance on, a more specific subsection to terminate parental rights does not exclude contemporaneous reliance on subsection (g).

The evidence was sufficient to terminate respondent's parental rights under MCL 712A.19b(3)(g) and (h). MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The trial court correctly found that the two-year period of incarceration referenced in subsection 19b(3)(h) begins at the time of the termination hearing, and includes both the time respondent is incarcerated and the time required for respondent to provide a normal home for the

child. *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992); *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987). Although no definite release date was provided for respondent, the trial court correctly incorporated all of the facts and circumstances regarding respondent in its consideration of whether Jacob would be deprived of a normal home for a two-year time period, including the time left on respondent's minimum sentence, how his conduct in prison affected the possibility of parole, his housing and employment status while not incarcerated, his prior provision of proper care and custody for the child or other children, and his prior benefit or lack thereof from services. Respondent clearly failed to provide proper care or custody for Jacob because he was incarcerated for Jacob's entire three years of life, and he did not provide alternate proper custody for Jacob while incarcerated. There was no reasonable expectation that respondent would be able to provide proper care or custody for Jacob within a reasonable time. It was also clear that Jacob would be deprived of a normal home life in excess of two years, because respondent had a minimum of 10 months yet to serve in prison, had failed to benefit from anger management classes in the past, had engaged in chronic criminality, and needed not only to comply with services upon his release, but to benefit from them before Jacob could be placed in his care. In light of these facts, the evidence also did not show that termination of respondent's parental rights was clearly contrary to Jacob's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

Affirmed.

/s/ Stephen L. Borrello

/s/ Janet T. Neff

/s/ Jessica R. Cooper